

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil
Case No. 19/624 CVL/Civil

BETWEEN: Joshua Tafaru Kalsakau
Claimant

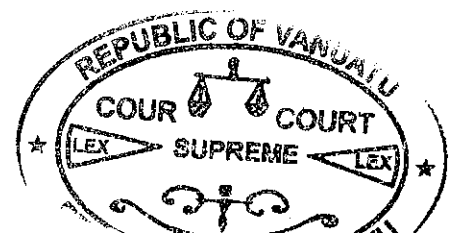
AND: ANZ Bank (Vanuatu) Limited
Defendant

Date of Hearing: 4 February 2021
Before: Justice G.A. Andrée Wiltens
In Attendance: J. Ngwele for the Claimant
Mr M. Hurley with Ms C. Hamer for the Defendant
Date of Decision: 26 February 2021

Judgment

A. Introduction

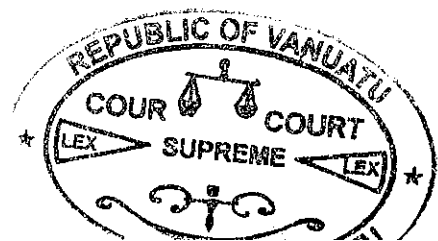
1. This case concerns the appropriateness of steps taken by ANZ Bank (Vanuatu) Limited ("ANZ") to attempt to recover funds lent to Mr Kalsakau in 3 tranches from September 2014 to August 2015. The funds were advanced to Mr Kalsakau in his personal capacity and to Maltauriki Trans Ifira Developments Limited ("MTI Developments"), of which he was the sole Director.
2. The loans fell into serious default by June 2017.
3. Mr Kalsakau alleged the ANZ had wrongly sought to sell off a personal asset, a large earth excavator, to reduce the outstanding debt. As the machine was contracted out to others, which contracts could not be completed due the ANZ's actions, Mr Kalsakau further maintained that MTI developments had thereby suffered loss. He sought damages accordingly.



4. The ANZ disputed the Claim and also counter-claimed for the balance of the total funds advanced to Mr Kalsakau and his company but not repaid, together with interest and costs.

B. Background

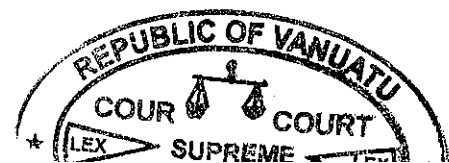
5. In 2014, Mr Kalsakau ran an earth-moving company while also being a Member of Parliament. To start with, while the business was a small enterprise, he operated it informally. It was only on 17 November 2014 that the business commenced to operate a bank account in the name of MTI Developments. Until then, all the company's finances had been intermingled with Mr Kalsakau's personal banking.
6. As at 1 September 2014, Mr Kalsakau's personal bank account with the ANZ had a large negative balance. It was in overdraft.
7. On 18 September 2014, Mr Kalsakau negotiated a first loan from the ANZ. The loan comprised of an overdraft facility of VT 3 million to support MTI Developments' working capital, an advance of VT 5 million to assist with the purchase of a new crusher machine, and an advance of VT 27 million to assist with the purchase of the excavator machine the subject of this case.
8. The security taken by ANZ for this loan was a mortgage over Mr Kalsakau's leasehold title No. 11/X212/003.
9. In October 2014, Mr Kalsakau went about purchasing some machinery. As part of that he obtained a quote from Bodiam Engineering for the excavator he subsequently purchased. The quote was addressed to MTI Developments and forwarded by way of an e-mail to Mr Kalsakau and an ANZ employee, Mr Takoar. The quoted cost for the excavator was VT 11,249,250. On 28 October 2014, Mr Kalsakau paid the full quoted price by way of a personal cheque.
10. On 31 October 2014, Mr Kalsakau's personal account had a debit balance of VT 27,585,578. The VT 27 million advance was drawn down on 3 November 2014, and transferred to Mr Kalsakau's personal account. Similarly, the VT 5 million advance was also drawn down and transferred to Mr Kalsakau's personal account.
11. On 15 April 2015, Mr Kalsakau negotiated a second loan from ANZ. In addition to the two personal advances of VT 5 million and VT 27 million already drawn down, the ANZ opened an overdraft facility for MTI Developments in the maximum amount of VT 15 million to support the trading business with working capital.
12. The security for this second tranche of funding was the mortgage already held by ANZ and an additional General Security Agreement ("GSA") over the undertakings and business assets of MTI Developments. Mr Kalsakau also provided a Director's Guarantee as additional security.



13. In preparation for this second advance, Mr Kalsakau had provided certain information to the ANZ setting out his personal, and MTI Developments', financial positions. It is of note that in the material provided to ANZ the excavator was valued at VT 8 million as of 6 March 2015.
14. On 18 August 2015, Mr Kalsakau negotiated a third loan from ANZ. In addition to the fully drawn down personal loans of VT 5 million and VT 27 million, there was a fully drawn MTI Developments advance of VT 13 million to assist with the purchase of 3 tipper trucks. As well, there was a new VT 15 million overdraft facility for MTI Developments to support the business by way of working capital.
15. As security for the third loan, a further GSA was signed for MTI Developments by Mr Kalsakau as sole Director. The specified assets included, but were not limited to, 2 Daewoo dump trucks. Importantly, the GSA recorded that the instrument secured "...all present and after acquired property".
16. In late 2016, due to significant arrears of payments due under the loan arrangements, the ANZ served a letter of demand on Mr Kalsakau. That was not complied with.
17. On 9 June 2017, ANZ and Mr Kalsakau entered into a Deed of Settlement in relation to the debt owed. Part of the arrangement required Mr Kalsakau to sell the lease which was the subject of the mortgage, which he failed to do within the permitted time set out in the Deed. Accordingly ANZ took the matter to Court and obtained consent orders enabling the sale of leasehold title No. 11/X212/003. The sale was settled on 28 January 2018 and just over VT 30 million was credited to Mr Kalsakau and TDI Development's overall indebtedness with ANZ.
18. There followed several settlement proposals to sort out the remaining debt, all of which unfortunately came to no fruition.
19. A subsequent review of the file led ANZ to the realisation that the valuable excavator was secured by the later GSA executed as part of the third loan arrangements. Accordingly, steps were taken by ANZ to repossess it and advertise it for sale. In response, two written offers were received, and the highest of VT 4 million was accepted by ANZ. In the end, this sale transaction did not proceed as Mr Kalsakau obtained restraining orders and then brought this litigation before the Supreme Court – that had the effect of frustrating the sale agreement due to the lapse of time.

C. Claim

20. Mr Kalsakau maintained the excavator was his personal property, and not that of TDI Developments. Accordingly, it was his case that the GSA did not give ANZ security over the asset, and the ANZ's attempts to seize and sell the excavator was impermissible. It was his position that the GSA dealt only with the 2 Daewoo dump trucks, and did not include the excavator.
21. Further, he provided evidence in the form of a 2 contracts in relation to the excavator:

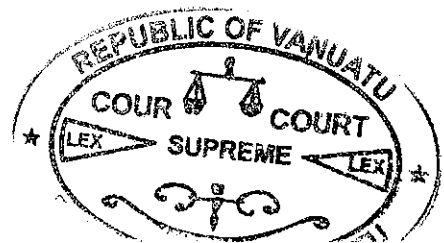


- The first, dated 5 July 2018, was between Mr Yves Melep and Mr Kalsakau for the use of the excavator on a road project in South Malekula over a 12-month period commencing on the date of the agreement. The contract price for the use of the excavator was VT 1 million plus VT 32,000 per hour on 4 aspects of the road project.
 - The second, dated 11 July 2018, was between Northern Contractor and Mr Kalsakau and was for the use of the excavator at Malekula for a month, commencing on a date to be agreed. This second contract was for VT 1 million.
22. The claim sought recompense for the 2 contracts not having been completed, as the excavator was seized by ANZ while undertaking work for Mr Melep. Mr Kalsakau alleges that this was done without due notice. For his loss of income and by way of general damages, Mr Kalsakau claimed VT 26 million.
23. Further, while it was attempted to move the excavator as part of the endeavoured sale for VT 4 million, it slipped off a conveying machine and ended up stuck in a large mud hole, where it remains. Accordingly, Mr Kalsakau additionally claimed the value of the excavator, which he submitted was entirely lost to him – he claimed VT 11,249,250 in respect of that.
24. Mr Kalsakau further claimed VT5 million by way of exemplary damages, together with interest on the amounts and costs.

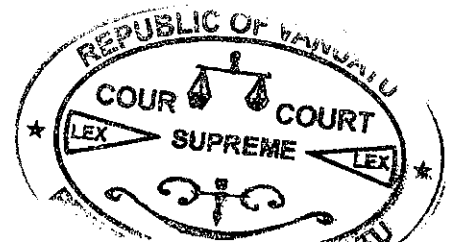
D. Defence

25. The ANZ did not accept that Mr Kalsakau had purchased the excavator. On the basis that (i) the excavator was the property of TDI Developments, and (ii) the GSA spelt out that the security for the loans included “present and after acquired assets” which must include the excavator, the ANZ maintained it was entitled to seize and sell the excavator as part of the security for the third loan.
26. In the alternative, the ANZ did not accept the loss of profits claimed, nor the alleged complete loss of the excavator. If there was such loss, the ANZ submitted that it was not due to the actions taken on its behalf.
27. As part of the counterclaim, the ANZ pointed out that the letter of demand had still to be met. There remained a considerable shortfall, and ANZ sought judgment for that. The 3 loans earlier set out which were in arrears by a total of almost VT 48 million, with interest accruing.
28. If there was any liability on the part of ANZ, which was denied, it was submitted that amount should be set off against the counterclaim.

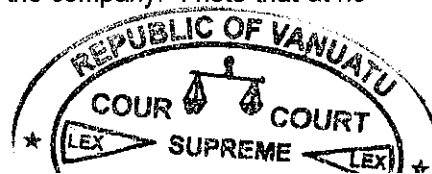
E. Evidence



29. The standard of proof Mr Kalsakau was required to establish to succeed in his Claim, and for ANZ to succeed with its counter claim, was "on the balance of probabilities". Another way to look at this is to assess whether what was accepted was more likely than not to be correct. The evidence had to be analysed to ascertain what was accepted and what was not.
30. The credibility and accuracy of witnesses' evidence is not to be assessed solely by how the witness appears in Court. The clues that might be relied on to gauge such matters are not obvious simply based on appearance or conduct. Of course those observations are a part of the process of evaluation, but they play only a small part.
31. What is of more significant is to look for consistency of accounts. I looked for consistency within a witness' account. I looked for consistency also when firstly, comparing that account with the accounts of other witnesses, and secondly when comparing the account of a witness with the relevant documentary exhibits. On that basis I formed certain views as to the reliability and veracity of the witnesses.
32. I also had regard to the inherent likelihoods of the situation then prevailing. I also had due regard to the passage of time, bearing in mind that some of the events were 7 years old, and the effect of that on memory.
33. Mr Kalsakau tendered five sworn statements in support of the Claim. He was cross-examined. Mr Hurley objected to several passages of the 3rd, 4th and 5th sworn statements, on the basis of hearsay and one passage which addressed the ultimate issue for the Court to determine. Mr Ngwele submitted that the passages had already been admitted into evidence by dint of having been filed, but that submission is rejected. He further sought to justify the evidence as relating not to the truth of the statements but the fact the statements had been made. He submitted it was a question of what weight the Court should give the evidence. I agree with Mr Hurley and did not pay heed to paragraph 10 or appendix JTK 8 of the 3rd sworn statement, paragraph 5 or appendix JTK 3 of the 4th sworn statement and paragraphs 21-21 or appendixes JTK 7 and JTK 9 of the 5th sworn statement.
34. Mr Kalsakau was not swayed in cross examination from his position that the excavator was his personal asset. However, he alleged that Veruja Kalpat from Bodium Engineering Limited had addressed the quote for the excavator to MTI Developments rather than to Mr Kalsakau personally. Mr Kalsakau stated that Ms Kalpat had done that of her own volition. His evidence in relation to that was implausible. He asserted that Ms Kalpat knew Mr Kalsakau was to pay for the excavator by way of personal cheque as he had the cheque with him when he attended Bodium Engineering Limited. I do not accept that. The e-mail Ms Kalpat sent with the quote to ANZ made it obvious that she expected the ANZ to arrange for payment. Further, a cheque by itself does not indicate there is sufficient funds in the account to meet the cheque – and in this instance, there wasn't.



35. Mr Kalsakau had to make several concessions under cross examination in order for his evidence to be accepted. He accepted the excavator had been with Northern Contractors from July 2018 to January 2019 without any of the contractual payments having been received. He was unwilling or unable to explain why there was no follow up for the money owing under the contract. He agreed that the excavator by October 2018 had depreciated, and that the inventory provided to the ANZ as part of the second loan arrangements was correct in setting the value of the excavator at VT 8 million. However, he was unable to explain given that depreciation and the likely further depreciation by the time the Claim was made why the Claim sought the original purchase price as his purported loss.
36. There was correspondence in October 2018 to January 2019 regarding the ANZ seizing the excavator from Northern Contractors to Mr Kalsakau. For reasons unexplained, Mr Kalsakau did not see fit to copy that to ANZ or to approach ANZ in relation to what he was being informed. This evidence did Mr Kalsakau no credit.
37. Mr Kalsakau accepted he had not responded to the defence evidence of Mr M. Kolivai, Mr G. Remon and Mr D. Joseph. His explanation for that was that he did not see any relevance to their evidence. I did.
38. Mr Joseph had agreed to purchase the excavator from ANZ. In January 2019, he instructed staff to move it from where it was being used by Northern Contractors, so that it could be shipped to where he required the machine. The evidence those witnesses provided demonstrated that the excavator was still working well at that time, albeit stuck in the swamp. If believed, that would further undermine the Claim for loss of the entire machine.
39. It also removed liability on the part of ANZ – they were not responsible for the attempted removal, as that was arranged by the new owner. Mr Kalsakau's lack of response to this evidence was detrimental to his credibility as what the witnesses said was clearly of relevance to the Claim.
40. Mr Kalsakau's position was that as the excavator was not specifically named in the GSA the ANZ was not entitled to have seized it as part of the security for the third loan. However, he accepted in cross-examination that even though his personal car was not named in the GSA the ANZ was entitled to seize and sell it. He advised that when asked he simply handed over the keys to an ANZ officer. He was unable to distinguish between that scenario and the excavator.
41. Mr Kalsakau did not address the counterclaim in his evidence. Accordingly I asked him what he wished to say about that. His response was evasive, in that he repeated that the excavator was his personal property. That answer did not in any way address the issue.
42. Mr Kalsakau agreed that he inter-mingled his personal accounts with that of MTI Developments. As the sole Director, he alone operated MTI Developments. There was no doubt also an inter-mingling of his personal affairs and those of the company. I note that at no

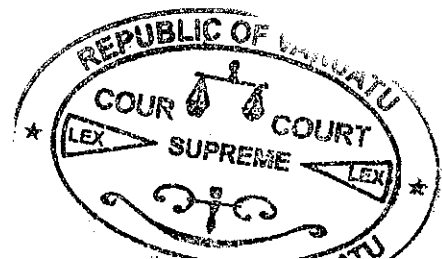


time was it submitted that the two excavator contracts in the name of Mr Kalsakau personally were not company-related. I concluded it unlikely that the contracts were personal to Mr Kalsakau. They related to the business of his company. Despite that, he doggedly did not accept the excavator was covered by the GSA as he maintained it was his personal property. He did not have any documentation to demonstrate MTI Developments acknowledged the excavator was his personal property.

43. Mr Kalsakau had an obvious interest in maintaining the excavator was his personal property. If that was correct, the ANZ was not entitled to seize it and sell it to set-off against the debt. Further, significantly, Mr Kalsakau would be able to point to the losses deriving from his 2 contracts which were not completed and set off a far greater sum against his ANZ debt.
44. However, I did not accept his evidence as to this. He was an unreliable witness. I was prepared to accept his evidence only where it was supported by other independent evidence. He could point to no evidence to support the fundamental plank of his Claim, namely that the excavator was his personal property.
45. Mr C. Sileye, the Lending Support Operations Manager for ANZ tendered a sworn statement in support of the defence. He was cross-examined.
46. In cross-examination he agreed the GSA only involved MTI Developments' property, not any personal property of Mr Kalsakau. He agreed further that Mr Kalsakau had used a personal cheque to pay for the excavator. He was, surprisingly, not challenged in relation to the debt still remaining.
47. I accepted him as a reliable and accurate witness.
48. There was additional evidence in the form of sworn statements by Mr M. Kolivai, Mr G. Remon and Mr D. Joseph. These witnesses were not required for cross examination as their evidence was not challenged. The effect of their evidence is referred to earlier.

F. Discussion

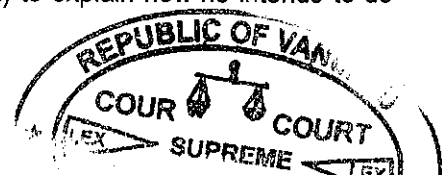
49. The first issue to consider is who was the actual owner of the excavator? If it was an asset belonging to TDI Developments, the Claim was doomed. If it belonged to Mr Kalsakau then the other aspects of the Claim and Defence needed to be considered.
50. Mr Hurley pointed to the intermingling of personal and business funds by Mr Kalsakau, both prior to and after the opening of TDI Development's bank account, as evidencing that the use of a personal cheque could not be a determining factor as to the true ownership of the excavator. I accept that.



51. Further, the company account for MTI Developments had not been opened at the time of the purchase. Mr Kalsakau had no other means to pay for the excavator other by personal cheque.
52. I did not accept Mr Kalsakau's evidence that the excavator was his personal property. That appears to me to be inherently implausible, given that he was a Member of Parliament and it was his business, that of MTI Developments, which needed to operate such a machine. For Mr Kalsakau to own such a machine in his personal capacity would have really negated the purpose of his operating MTI Developments.
53. Mr Kalsakau's evidence in relation to the quote for the excavator being addressed to MTI Developments is also not accepted. There is no reason for Ms Kaltap to take it upon herself to advise ANZ that the excavator was to be purchased by MTI Developments if in fact that was not the case. I did not accept the allegation as more likely than not.
54. Accordingly, I am of the view that it is more likely than not that the excavator was the property of MTI Developments. The ANZ was entitled to seize their security, the excavator, and to sell it to reduce the debt owing.
55. There is no need to go on to consider the various other aspects of the Claim as they must of necessity fail, given the first findings.
56. Mr Ngwele sought in his opening, and again in his closing submissions to embark upon a criticism of the ANZ's sale of the property and other assets, submitting that they were worth more than had been obtained.
57. I disallowed Mr Ngwele to develop those submissions, as that was not an allegation made previously in the pleadings, in the evidence filed prior to trial, or in any other manner than at the hearing for the first time. To have done otherwise would have been unfair. The ANZ was at Court to deal with the Claims made, not to deal with surprise additional matters.

G. Result

58. The claim is dismissed.
59. The counter claim succeeds. Judgment is entered against Mr Kalsakau in the sum of VT 41,698,010, with daily interest to run on all the loans at the rate agreed between the parties from 30 September 2020 until paid in full.
60. Mr Kalsakau is also to pay the costs of this proceeding. Mr Hurley has indicated he wishes to be heard on that issue.
61. A further conference is scheduled for 8.30am on 11 March 2021 for Mr Kalsakau to advise the Court: (i) that he has paid the judgment sums awarded, or (ii) to explain how he intends to do



so. If there is no satisfactory conclusion, the file will be transferred to the Master for immediate enforcement action to be pursued.

62. The issue of costs is also to be addressed at that conference. Counsel have leave to file written submissions ahead of the conference if they so choose.

63. In order for this to occur, a copy of this judgment must be served on Mr Hopkins, with a proof of service provided.

**Dated at Port Vila this 26th day of February 2021
BY THE COURT**

Ganchei Uel
Justice G.A. Andrée Wiltens

